No. 1090.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

CABOT T. THOMAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

The facts in this case are substantially like those appearing in the case of Cardwell vs. The United States, which is pending in this Court, and in which a brief has been prepared and filed. All of the lands involved in this suit, aggregating approximately some eighty-four sections of odd and even numbered sections of land (Tr., p. 73), are situated in township 1 south, of range 21, east, and townships 1 and 2 north, ranges 21 and 22, east of the

Montana meridian, Yellowstone county, state of Montana. This vast tract of territory is inclosed by a fence, segregating the lands so inclosed, containing the odd as well as the even numbered sections, from the public domain. The townships of land in question are situated within the primary limits of the government grant to the Northern Pacific Railroad Company, made to said railroad company in 1864, and prior to the construction of the fence and inclosure by the appellant on and of the lands and premises mentioned, the appellant, Thomas, purchased from the railroad company the odd numbered sections lying within the area inclosed. The even numbered sections, embraced within the inclosure referred to, aggregating some forty sections in number, are public lands belonging to the appellee, the United States of America. Referring to the diagram, pages 21 and 22 of the transcript, used by the witnesses who testified upon the hearing, for the purpose of identifying and locating, as nearly as it was possible for them to do so, the particular tracts and sections of land inclosed, the red line indicates the position of *such parts of the appellant's fence* (Tr., p. 52), as the witness Tilden, who prepared the diagram (Tr., p. 35), was able to locate. While the fence surrounds the entire tract, the red lines, indicating the position of the fence, were not drawn "clear around" upon the diagram, because, the fence not following the lines "in all places," the lines were drawn "just where they were positive of the fences, and acquainted with the fences." (Tr., p. 55.)

On the east side the fence connects with "what is called the Big Lake," which is about two miles wide and from four to seven miles long (Tr., p. 38), and thence continues on north. (Tr., pp. 39, 63.) On the west side, that portion of the appellant's fence which forms the west boundary line of the inclosure north of the base line, not drawn on the diagram, starts at the southeast corner of section 32, of township 1 north, range 21, east, and runs "in a northerly direction, in a zigzag north, and connects with another fence near section 21, in township 2 north, range 21, east" (Tr., pp. 36-37), and this fence, together with the other fences marked and described, inclosed the lands in question in this case (Tr., p. 43). The total area inclosed is so large that a person "would have to be pretty well mounted to ride around the fence in one day without going outside of the field, commencing on the inside of the inclosure claimed by Mr. Thomas." (Tr., pp. 45, 54.)

It appears that the appellant practically constructed all of the fence required to complete the inclosure (Tr., p. 47). He constructed the fences at different times while the witness Tilden "was riding around through the country," who saw the fence constructed (Tr., p. 53). And the appellant told the witness Story, that he had some eighty-four odd and even numbered sections inclosed and claimed to own them (Tr., p. 73), and was not only at all times using, but also claiming, the inclosure (Tr., p. 85). The fence on the west side of the inclosure was the first one to be erected, and thereafter the other fences

surrounding the land inclosed were put up by the appellant (Tr., pp. 84 and 57). There is a division of fence between the appellant's inclosure and one Molt, to the north of the Big Lake, being a portion of the north line of the inclosure, but the greater portion of that fence was built by the appellant (Tr., p. 57).

The right to the exclusive use and occupancy of the lands inclosed, while disclaimed in the answer, was, as a matter of fact, always asserted and exercised by the appellant Thomas. It is used by the appellant for grazing and pasturing his stock (Tr., pp. 41-42), and no one else is allowed to make use of any of the lands inclosed. (Tr., pp. 53, 57, 61, 64, 65 and 67.) The witness Story is not permitted, without being in contempt of the state court, to go anywhere inside of the appellant's inclosure, because of "an injunction issued by the District Court by request of the appellant (Tr., p. 68), and as to him the public lands within the inclosure are doubly barred (Tr., p. 69), viz: by means of the injunction "and his fence." "If his fence was down," says the witness, "the injunction wouldn't cut much figure." (Tr., p. 71.) And as to the appellant's ownership of this fence, which surrounds and incloses the lands involved in this case, together with the odd numbered sections mentioned and described in the verified complaint of the appellant upon which the injunction referred to by Mr. Story was issued, the appellant himself says, under oath, that "said lands were inclosed by a good and substantial fence, the prop-

erty of'' the said appellant. (Tr., p. 25.) The decree which was entered upon this complaint in the state court is, to say the least, drastic in its terms and provisions. It orders the witness Story, ''his servants, counselors, attorneys, solicitors, and agents, and all other persons acting in aid of or in assistance to him, and each of them,'' to ''*absolutely* desist and refrain from driving any cattle in, upon or through any of the fences mentioned in the plaintiff's (appellant's) complaint,'' which is the fence complained of in the suit at bar, and which incloses, together with the lands described in appellant's complaint in the state court, the even numbered sections and public lands of the United States described in the bill of complaint in this case. (Tr., p. 31.)

As in the Cardwell case, so in this, the only question involved is whether, under the foregoing facts and circumstances, disclosed by the record herein as hereinbefore outlined, the appellant has violated the provisions of the Act of Congress of February 25, 1885, entitled ''An Act to prevent unlawful occupancy of the public lands.'' Counsel for the appellant asserts that there was no such violation of the Act in question, because, while it is true that the evidence establishes the fact that there was an inclosure of large tracts of public land, to which the appellant confessedly (Tr., p. 12) has no claim or color of title, the fence surrounding such public lands was not entirely owned by the appellant, and that therefore the appellant was not maintaining an inclosure of public lands, such

as is contemplated by the statute. That as the statute denounces only "enclosures of public lands," it was necessary for the Government to prove that the appellant maintained an *inclosure* of the public lands described in the bill of complaint, *or that he asserted a right to the exclusive use and occupancy thereof.*" Now we agree fully in every sense of the term with the last postulate laid down by counsel in the preceding quotation from his brief, viz: that if there was an assertion on the part of the appellant of a right to the exclusive use and occupancy of the public lands inclosed, the decree in this case was properly rendered against the appellant. But, notwithstanding the fact that the evidence clearly, conclusively, and uncontradictedly proves and establishes that very thing, to-wit: the assertion, claim, and the actual exercise of the right to the exclusive use and occupancy of the lands described in the bill of complaint (Tr., pp. 41-42, 53, 57, 61, 64, 65, 67, 68, 69, 71), counsel nevertheless complains of the decree entered herein, because it did not find that the appellant maintained an inclosure of these lands. Why, says counsel, the "language of the decree does not conform to section 1 of the statute, in that it fails to find that the lands described were *inclosed*. There is a difference between maintaining a fence upon public lands, and an inclosure of public lands."

Now, it is evident that counsel did not subject the Act of Congress in question to that careful and particular study and consideration which should have been given.

Aside from the statute, however, and irrespective of any provisions therein contained, the case at bar was properly determined, considering the facts and circumstances of this case, upon the authority of United States vs. Brighton Ranche Co., 26 Fed., 218, where Mr. Justice Brewer, then a Circuit Judge, in delivering the opinion of the Court, spoke as follows:

> "Generally speaking, any encroachment upon the public domain may be restricted or ended by injunction; and in this case it was not the mere fact that the fence is built upon government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a Court of Equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property."

United States vs. Brighton Ranche Co., 26 Fed., on p. 219.

Now, as to the Act of Congress referred to, we said that counsel could not have given the statute that attentive and scutinizing study which the subject requires, because if he had done so, he would have found that there are a number of matters and things which the law condemns.

The acts denounced by the provisions of the statute are as follows:

1. The making, erecting or constructing by any person of inclosures of any public lands, to which land included within such inclosure, the person making or constructing the inclosure had no claim or color of title.

2. The asserting, by any person, of a right to the exclusive use and occupancy of any part of the public lands, without claim or color of title.

3. Preventing or obstructing, by any fencing or inclosing, or any other unlawful means, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry.

4. Preventing or obstructing, by any fencing or inclosing, or any other unlawful means, free passage or transit over or through the public lands.

1 Supplement Rev. St., pp. 477-478.

And lastly, the Act provides that all persons violating *any provisions* of said Act, "whether as owners, *part owners,* or agents, or who shall *aid* or *assist* in *any* violation" thereof, are equally amenable to the law, and subject to the penalties therein prescribed.

The bill of complaint charges the appellant with the commission of each of the several acts forbidden by the statute, and we submit that the evidence fully establishes

these averments, to-wit: The existence and maintenance by the appellant of the inclosure; that he asserted, claimed and actually and in fact exercised the right to the exclusive use and occupancy of the lands in question, without color or claim of title thereto or any portion thereof; that he obstructed and prevented persons from entering upon any of the tracts of public lands embraced within the inclosure by means of "*fencing* or *inclosing* and other unlawful means;" and that by *fencing* or *inclosing* and other unlawful means, he prevented and obstructed *free passage* and *transit* over or through the public lands" lying within the inclosure. (Tr., pp. 58, 59, 71 and 72.)

Now, while it is of absolutely no consequence under the principle of law enunciated in U. S. vs. Brighton Ranche Company, supra, as well as under the Act of Congress concerning unlawful occupancy of the public lands, whether the whole line of fence constituting the inclosure in this case is owned by the appellant or not, so long as such fencing or inclosing operates "to separate the inclosed lands from the general body of the public domain," or "prevents or obstructs any person from peaceably entering upon" the lands inclosed, or "prevents or obstructs free passage or transit over or through" such lands, we submit that the evidence clearly shows that the inclosure was erected,—that is to say, the fact of inclosing the public lands involved in this case was accomplished, by the appellant. The evidence discloses that the fence along the west side of the inclosure, in other words, the

fence constituting the western boundary of the inclosed tract, was in existence when the appellant erected and constructed the fence along the other three sides of the inclosure as it now exists (Tr., p. 84). This west line of fence appears to have been constructed by the appellant and one Alf Thomas and Edward Cardwell; Alf Thomas having erected four miles of that fence (Tr., p. 49), Cardwell two miles (Tr., p. 27), and the appellant the remainder, or about nine miles of the fifteen miles of fencing along the western line. The greater portion of the fence north and west of the "Big Lake" belongs to the appellant (Tr., p. 57), joining on to a division fence between the appellant and said Molt (Tr., p. 50). By thus joining on to existing fences, the appellant created, erected and constructed the inclosure complained of in this case, and now maintains and controls said inclosure.

We have thus shown that the appellant violated every section and provision of the Act of Congress applicable to this case, not only as a "*part owner*" or as a person "*aiding or assisting*" in a violation of the law, which would be all that is necessary under the law, but as the owner of the inclosure and of the fence which created and brought into existence the inclosure as such, and as the person no wmaintaining and controlling said inclosure, and asserting and exercising the right to the exclusive use and occupancy of the public lands embraced and included therein.

That portion of the brief of counsel for the appellant,

purporting to give the evidence as contained in the record, is so glaringly inaccurate and misleading, that we are driven to the conclusion, knowing full well the counsel's disposition to act with absolute fairness and candor even under trying conditions and circumstances, that he found the situation to be such in this case, as required him to indulge in assumptions and inferences, not borne out by the record, to meet the necessities of a hard case.

On page 9 of counsel's brief he says:

> "The red lines on this plat are intended to show the fences of the appellant, and it will be seen from examination thereof that no lands are inclosed by this fence."

The fact of the matter is, and the testimony shows, that the red lines drawn upon the diagram, which was prepared by the witness Tilden, represent only a portion of appellant's fence. The red lines were not drawn "clear around," because the witness could not give the exact location of the balance of the fence, as the fence did not follow the lines "in all places."

Transcript, pp. 52, 55.

While the witness Tilden testified, when asked in a general way as to the amount of fence owned by persons other than the appellant, that he "should judge about 15 miles," originally constructed by others than Mr. Thomas, as to the ownership of which at this time he does not pre-

tend to say, out of a total line of fence from forty-five to fifty miles in length, yet when questioned as to the particular portions of the fence constructed by others than appellant, he gives us six miles, all in the west line of fencing, which was in existence there at the time when appellant inclosed the tract involved in this case, viz: four miles of fence constructed by Alf Thomas and two miles constructed by Cardwell.

Transcript, pp. 27 and 49.

"Walter Story," says counsel on page 11 of his brief, "testifies that there is at least three miles on the north of township 1 south, range 21, east, that there are no fences," and the only possible explanation which suggests itself to us as to how counsel happened to cite this testimony is that he failed to look at the diagram attached to the record. Mr. Story's testimony relates to the fencing on the "north boundary line" of township 1 south, range 21, east, in other words, the base line. An inspection of the diagram shows that twenty sections of township 1 south, range 21, east, are inclosed on three sides, and a distance of two miles on the north, extending to the southeast corner of section 32 in township 1 north, range 21, east, which is the starting point of the fence running north (Tr., pp. 36-37). From that point to the northeast corner of township 1 south, range 21, east, the three miles referred to by the witness, there is no fence, and this opening connects the inclosure south of the base

line with that lying north thereof, but it does not open out onto the uninclosed public domain.

A consideration of all the facts of the case must necessarily lead to the conclusion, fully borne out and sustained by the evidence herein, that the appellant erected and constructed an unlawful inclosure of public lands; that he has maintained and does now control and maintain said inclosure, asserting and exercising the right to the exclusive use and occupancy of the public lands inclosed, and that by means of fencing and inclosing he prevents and obstructs entry upon said lands, and by means of fencing and inclosing prevents and obstructs free passage or transit over or through such lands. The appellant, therefore, was and is violating every provision of the Act of February 25, 1885, and was liable to prosecution under said Act and subject to the penalties therein prescribed.

It follows that the action was properly and correctly tried and determined, and that the judgment and decree of the trial court should be affirmed.

Respectfully submitted,

CARL RASCH,

United States Attorney.